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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

ANTHONY J. LOBUE AND THOMAS KULEKOWSKIS,
Petitioners,

v.

JOSEPH G. DILEONARDI, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

GERALD A. FEFFER
MAX STIER*
MATTHEW J. HERRINGTON
JULIE C. HILDEN
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000

MICHAEL J. HOWLETT, JR.
JAMES D. WILSON
PATRICIA S. SPRATT
SHOEFSKY & FROELICH LTD.
444 North Michigan Ave.
Chicago, IL 60611
(312) 527-4000

**Counsel of Record* *Counsel for Petitioners*

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QUESTIONS PRESENTED

1. Must a federal court in a kidnapping prosecution defer to relevant state family law regarding custody over, and competence of, the alleged victim?

2. Are legal guardians, like parents, exempt from prosecution under the federal kidnapping statute?

LIST OF PARTIES

Petitioners Anthony J. Lobue and Thomas Kulekowskis were the subjects of an extradition proceeding before the magistrate judge, and were habeas petitioners in the District Court and appellants in the Court of Appeals. Respondent Joseph G. DiLeonardi, United States Marshal for the Northern District of Illinois, was the habeas respondent in the District Court and the appellee in the Court of Appeals. Also subjects of the extradition proceeding before the magistrate judge were Anthony DeSilva, Albert DeSilva, and Judith Schon.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case September 26, 1997.

OPINIONS BELOW

The opinion of the Magistrate Judge is reported at 881 F. Supp. 1126 and reproduced in the Appendix at 34a. The opinion of the United States District Court for the Northern District of Illinois granting habeas corpus is reported at 941 F. Supp. 741 and reproduced in the Appendix at 12a. The opinion of the Court of Appeals is reported at 125 F.3d 1110 and reproduced in the Appendix at 1a. Its order denying rehearing and rehearing in banc is unreported and is reproduced in the Appendix at 84a.

JURISDICTION

The judgment of the Court of Appeals was entered September 26, 1997. Appendix at 1a. A timely petition for rehearing was denied November 26, 1997. Appendix at 84a. A timely application for an extension of time within which to file a petition for a writ of certiorari until April 15, 1998 was granted by Justice John Paul Stevens on January 27, 1998. Appendix at 85a. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The federal kidnapping statute, 18 U.S.C. § 1201, is reproduced in the Appendix at 87a.

STATEMENT OF THE CASE

A. The Facts

On May 24, 1988, an Illinois state court, after a hearing, found that Tammy DeSilva was mentally incompetent as a result of a December 1987 car accident that had caused her severe brain damage and left her a quadriplegic. S.R. 1 (DX 13).[1] Tammy was represented at the hearing by a court-appointed guardian *ad litem*. Tammy's parents, Mr. and Mrs. Wright, had received notice of the guardianship hearing, and Mr. Wright appeared there by counsel, but neither of Tammy's parents applied to become her guardian; only Tammy's husband, Anthony, did so. S.R. 1 (DX 1, 6). At the hearing, the court considered uncontradicted medical evidence showing that Tammy was, in the words of the doctor who examined her, "totally incapable of making personal and financial decisions." S.R. 1 (DX 11). And the court so found. S.R. 1 (DX 13). Accordingly, the court appointed Anthony as Tammy's plenary guardian, endowing him with full responsibility for all decisions relating to the care of Tammy's person or to her financial affairs. *Id.*

Acting in his capacity as Tammy's guardian, Anthony temporarily moved Tammy to Canada – where the couple owned a home and where Tammy, as a Canadian citizen, could receive free medical care. S.R. 1 (DX 29, 33). (The costs of Tammy's care in the United States since the accident

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[1] The volumes that constituted the supplemental record on appeal below are referred to as "S.R. 1" and "S.R. 2." The original record on appeal below is referred to as "O.R. Lindberg" or "O.R. Shadur," with the names "Lindberg" and "Shadur" referring to the two District Judges who were, at different times, assigned to the case.

had been so great that Anthony, who worked as a jockey at a Chicago racetrack, had been forced to apply for public aid, and to ask his parents to take Tammy into their home, where they spent over $50,000 on her care. S.R. 1 (DX 29-30, 33)). Anthony was unable to move to Canada with Tammy because he could not find steady work there, so he and Tammy's mother, Mrs. Wright, agreed that Mrs. Wright would live in the couple's home and care for Tammy while Tammy was in Canada. *Id.*

In June 1988, acting in his capacity as guardian, Anthony initiated a tort suit in Illinois on Tammy's behalf to recover damages for the injuries she had suffered in the car accident. S.R. 1 (DX 33). As the tort suit progressed, it became necessary for Tammy to travel to Illinois to undergo a medical examination for the suit. Anthony retained a registered nurse to care for Tammy during the trip. Anthony feared that the Wrights, who wanted Tammy to stay with them in Canada, would object to the trip. For this reason, Anthony's attorney in the tort suit, Timothy Touhy, asked petitioners – two heavily-decorated Chicago police officers with spotless records and more than 50 years' combined experience – to accompany Anthony and the nurse to ensure that Anthony could peaceably transport Tammy, his ward, from Canada to Illinois for the necessary medical examination. *See* S.R. 1 (DX 20, 33, GSX 3 at 6, 9, 10, 11); O.R. Lindberg 22 ¶¶ 4-5.

Petitioners agreed to accompany Anthony, Tammy, and the nurse on the trip to Canada and back without any compensation, solely as a favor to Mr. Touhy, their longtime friend. *Id.* Petitioners checked with Mr. Touhy beforehand to ensure that transporting Tammy was legal. *Id.* In addition, at petitioners' behest, Mr. Touhy contacted Canadian police authorities by telephone to ensure that even

if the Wrights complained to the police, the trip would still be allowed to go forward. *Id.* Mr. Touhy then reported to petitioners that based on Anthony's guardianship order and Mr. Touhy's conversation with Canadian police authorities, there would be no violation of law if petitioners, Anthony, and the nurse transported Tammy as planned. *Id.*

Thus, on February 3, 1992, Anthony, with petitioners and the nurse, attempted to transport Tammy from Canada to Illinois for the medical examination. After petitioners picked Tammy up at the couple's home, Mrs. Wright called the Canadian police and told them a kidnapping had occurred. U.S. authorities then stopped petitioners at the border and questioned Tammy through a computer keyboard, the only means by which she can respond. S.R. 1 (GX062, GX068-69). Based upon Tammy's mutually contradictory answers – which suggested that Tammy wanted both to be with Anthony and to be with her mother, *id.*—Tammy was sent back to Mrs. Wright in Canada, and petitioners were directed to return to the United States.

Later in 1992, a Canadian court appointed Mr. and Mrs. Wright as Tammy's guardians, finding (just as the Illinois court had earlier) that she was incompetent to make decisions on her own behalf about the care of her person and her financial affairs.[2] When Mrs. Wright had claimed a

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[2] Both of the Wrights had earlier passed up the opportunity to apply to become Tammy's legal guardian in the Illinois proceeding in which Anthony was appointed. See supra, pp. 2-3. The Seventh Circuit, in the decision below, briefly suggested in dictum that the Wrights, as Canadian citizens, "were automatically excluded" from the Illinois guardianship proceeding – but it chose not to "pursue the subject," basing its holding on a different ground. DeSilva v. DiLeonardi, 125 F.3d 1110, 1114 (7th Cir. 1997). In fact, contrary to this dictum, the Wrights were not excluded from the guardianship proceeding but were fully able to participate therein. Mr. Wright appeared there by counsel; no part of the proceeding

kidnapping by petitioners, she had asserted, in effect, that Tammy was being transported despite the fact that she knowingly had withheld her consent to travel. Yet in support of their guardianship application, the Wrights now submitted affidavits from two doctors who concluded, respectively – just as every court and doctor to assess Tammy's mental condition since the accident had concluded – that (1) Tammy was "unable to make any rational decisions," S.R. 1 (DX 23), and (2) Tammy "exhibited impaired mental reasoning . . . [and] is incapable of managing her own affairs." S.R. 1 (DX 24).

In February 1993, the Wrights finally transported Tammy to the United States for the medical examination necessary to the tort suit Anthony had brought – over a year after Anthony had wanted the examination to be performed. S.R. 1 (DX 26, 36). The neuropsychologist who conducted the examination concurred in the finding of every other court or doctor ever to address the question: Tammy is not capable of meaningfully exercising the power to consent, and needs a guardian to do so on her behalf. S.R. 1 (DX 36). Tammy ultimately prevailed in the suit that Anthony had brought, which resulted in a settlement for her of over $3 million dollars.

Based on Mrs. Wright's complaint, Canada now seeks to extradite Anthony and the petitioners and to prosecute them for kidnapping, a crime punishable in Canada by life imprisonment.

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occurred ex parte; the Wrights were free to, and did, object to the appointment of Anthony as Tammy's guardian; and either of the Wrights could have been appointed Tammy's guardian had he or she been willing to reside where Tammy then lived, in the United States. See 755 Ill. Comp. Stat. 5/11a-5(a) (requiring that guardian be United States resident, but not United States citizen).

B. The Magistrate Judge's Ruling

The extradition proceeding was brought before a magistrate judge sitting in the Northern District of Illinois. As the magistrate judge noted, according to the Extradition Treaty between the United States and Canada, extradition may be granted only when "dual criminality" exists – meaning that the conduct at issue constitutes an offense punishable under the laws of both Canada and the United States. *In re Extradition of Kulekowskis*, 881 F. Supp. 1126, 1135-40 (N.D. Ill. 1995).

To assess whether the conduct at issue here is punishable under U.S. law, it is necessary to consider a hypothetical, reversed fact scenario under which the relevant conduct would have occurred in the United States. *Id.* In this hypothetical scenario, Anthony, armed with a *Canadian* guardianship order with precisely the same procedural pedigree as the actual Illinois order, would have attempted to transport Tammy *from Illinois to Canada* for the medical examination. *Id.*

The magistrate judge held that such an attempt would have violated Illinois' kidnapping statute, despite the procedurally proper Canadian guardianship order. *Id.* The magistrate judge acknowledged that a procedurally proper Canadian guardianship order could be accorded comity and recognized by an Illinois court and that such an order, if recognized, would bar an Illinois kidnapping prosecution. *Id.* at 1139-40. Nevertheless, the magistrate judge held that because a Canadian guardianship order might not be recognized in Illinois, such an order did not constitute an "absolute bar" to an Illinois kidnapping prosecution, and that therefore dual criminality was still technically satisfied "even if the chance of actual prosecution, conviction and

punishment [in the hypothetical scenario] were remote." *Id.* at 1140.

C. The District Court's Ruling

On habeas corpus, the district court reversed the magistrate judge's ruling, holding that the government had not carried its burden to show "dual criminality." *Kulekowskis v. DiLeonardi*, 941 F. Supp. 741, 745-50 (N.D. Ill. 1996). The district court accepted petitioners' argument that their conduct would *not* have constituted a U.S. offense, under either federal or Illinois law. *Id.* And, after an extensive discussion of the relevant law, the district court specifically reversed the magistrate judge's ruling that the conduct at issue could give rise to a valid Illinois prosecution for kidnapping, holding instead that a guardianship order like Anthony's would bar such a prosecution. *Id.*

In so doing, the district court initially noted the strong presumption favoring the recognition of foreign judgments. *Id.* at 747. It then held that an Illinois court faced with a Canadian guardianship order would have been bound to apply the four-part test for the recognition of foreign judgments that this Court set forth in *Hilton v. Guyot*, 159 U.S. 113, 166-68 (1895). *Kulekowskis*, 941 F. Supp. at 748. Under this test, the court held, a foreign judgment will be recognized if "[(1)] the rendering court had jurisdiction over the person and subject matter; [(2)] there was timely notice and an opportunity to present the defense; [(3)] no fraud was involved; and [(4)] the proceedings were according to a civilized jurisprudence." *Id.* (quotation omitted). Applying this four-part test, the district court found that:

> First, there clearly would be personal and subject matter jurisdiction since [Anthony] and Tammy resided in the forum state. Second, the Wrights had notice and opportunity to present a defense. Mr. Wright appeared at the guardianship hearing through counsel while Mrs. Wright, after being served with notice of the proceedings, consulted with Tammy's *ad litem* appointed guardian who represented her at the hearing. Third, no suggestions of fraud have been advanced. Fourth, there is no doubt that a proceeding identical to the Illinois hearing would qualify as being conducted in accordance with civilized jurisprudence.

Id. at 748. For these reasons, the district court concluded that a valid Canadian guardianship order with the procedural pedigree of the order at issue here would certainly be recognized by the Illinois court. In addition, the district court concluded that such an order, once recognized, would legally bar a kidnapping prosecution. *Id.* at 745-50. Accordingly, finding that dual criminality was lacking, the district court issued the writ of habeas corpus in petitioners' favor. *Id.* at 750.

D. The Court of Appeals' Ruling

After a two-page discussion, the Seventh Circuit reversed the district court's dual criminality ruling, holding that the conduct at issue constitutes an offense under United States (specifically, federal) law. *See DeSilva v. DiLeonardi*, 125 F.3d 1110, 1113-14 (7th Cir. 1997). It did not discuss the Illinois kidnapping statute. *Id.* Nor did it disturb the

district court's holding that a hypothetical Canadian guardianship order procedurally identical to the actual Illinois order at issue here would be recognized in the United States as the legal equivalent of a U.S. state court guardianship order. *See id.* Instead, the sole basis for the Seventh Circuit's decision was that a legal guardian violates the federal kidnapping statute, 18 U.S.C. § 1201, if he tries to transport his ward interstate or internationally over her protests. *See DeSilva*, 125 F.3d at 1114. The Seventh Circuit made crystal clear that its holding rested solely on its interpretation of § 1201 by stating that "[o]ne federal criminal statute [§ 1201] is the *only* law we need discuss," and that it need not "pursue" other possible grounds of decision. *DeSilva*, 125 F.3d at 1114 (emphasis supplied).[3]

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[3] The Seventh Circuit also suggested in dictum that "the kind of orders involved here would not necessarily have been enforced even within the United States." Id. This dictum is in error. There is no reason to think that the kind of guardianship order at issue here, which was procedurally unimpeachable, would not have been enforced within the United States. Indeed, to suggest otherwise leads to absurdities – implying, for example, that Illinois courts routinely issue procedurally defective guardianship orders that do not deserve to be recognized abroad. The Seventh Circuit's belief that this procedurally impeccable order might not be enforced was apparently based on its factual misimpression that the Wrights, as Canadian citizens, had been "automatically excluded" from the guardianship proceeding, see DeSilva, 125 F.3d at 1114, but this belief is entirely mistaken. See supra n.2. Further, in referring to "orders," the Seventh Circuit's dictum refers both to Anthony's guardianship order and to another, ex parte Illinois court order, which by its language authorized petitioners to transport Tammy from Canada to the United States. However, in arguing that their conduct did not constitute an offense, petitioners have relied upon only the guardianship order – which was issued after notice and a hearing – not the separate, ex parte order, which is irrelevant here.

The Seventh Circuit also separately held that the extradition statute is constitutional despite a possible separation-of-powers challenge, although this issue had been neither briefed below nor

Interpreting § 1201, the Seventh Circuit held that a federal court in a kidnapping prosecution is not bound to defer to a valid state court guardianship order, for such an order "may show that a state judge believed that the ward lacks the mental capacity to give or refuse consent, but what a state judge believes is not conclusive in the federal prosecution." *Id.* The Court also separately held that legal guardians, unlike parents, are not exempt from § 1201. *Id.* Thus, it concluded that "a guardian who moves an adult ward across state or national boundaries, against her will, . . . may be convicted of kidnapping." *Id.* at 1115.

REASONS FOR GRANTING THE WRIT

This case presents a fundamental federalism question as to which the Circuits are divided: whether state family law (here, guardianship law) deserves deference in a federal kidnapping prosecution. It thus raises the issue whether State courts and legislatures have exclusive power in the intimate and quintessentially local family law setting, or whether – as the decision below held – federal courts may second-guess the States, reconsidering and revising family law determinations that the States have already made.

To hold, as the court below did, that federal courts in kidnapping cases may ignore state family law, including state court judgments, sets a dangerous precedent that contradicts well-established principles of constitutional federalism law. As Chief Justice Rehnquist has stated, family law should remain the exclusive province of the States, which enjoy the benefit of over two centuries of

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resolved by the district court. Petitioners do not cite this holding here as a reason to grant certiorari.

experience in the area – for "[i]f ever there were an area in which federal courts should heed the admonition of Justice Holmes that 'a page of history is worth a volume of logic,' it is in the area of domestic relations." *Santosky v. Kramer*, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

This case also presents a second important issue: whether legal guardians are exempt from prosecution under the federal kidnapping statute. The decision below held that they are not. Yet the phrase "guardian kidnapper" should be an oxymoron. Legal guardians are granted custody over incompetent adults precisely so that they can make important decisions (such as whether and when to travel) on their wards' behalf and in their wards' best interests. Thus, legal guardians exercise by proxy their incompetent wards' power to give and withhold consent in *every* area – from contracts to trusts to surgical procedures to medications to housing – even when the ward strenuously disagrees. Travel should be no exception. However, according to the decision below, the phrase "guardian kidnapper" is not an oxymoron; it is a description of a potential felony defendant. Under that decision, a legal guardian who transports his incompetent ward over the ward's protest – even for a beneficial end, such as, here, Tammy's medical examination for her tort suit – can still be found to have "kidnapped" the ward and thus be subject to a federal prosecution in which he faces possible life imprisonment.

Thus, the decision below raises important issues of law both when it holds that a federal court is not bound by state family law in a federal kidnapping case, and when it holds that a legal guardian may be prosecuted for transporting the very incompetent ward for whom he is deputized to be a plenary proxy decisionmaker. On each of

these issues, the Circuits are split. And, on each, the Seventh Circuit, in the decision below, falls on by far the worse side of the split – in light of this Court's decision in *Chatwin v. United States*, 326 U.S. 455, 460 (1946). In *Chatwin*, the Court's analysis showed that federal courts *must* defer to state family law in federal kidnapping cases. And, in *Chatwin*, the Court expressly equated parents with legal guardians of incompetent adult wards which logically entails – that legal guardians of incompetent adult wards must share the same immunity from kidnapping prosecution that parents already indisputably enjoy. The Seventh Circuit's decision thus conflicts so sharply with *Chatwin* that not just certiorari, but also summary reversal, is warranted here.

I. THE CIRCUITS ARE SPLIT AS TO WHETHER A FEDERAL COURT IN A PROSECUTION FOR KIDNAPPING MUST DEFER TO RELEVANT STATE FAMILY LAW

The Circuits are split as to whether a federal court, in a prosecution under the federal kidnapping statute, 18 U.S.C. § 1201, must defer to state family law relevant to the competence of, and custody over, the alleged kidnapping victim.

The federal kidnapping statute, 18 U.S.C. § 1201, states in pertinent part that:

> Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when . . . the

> person is willfully transported in interstate or foreign commerce . . . shall be punished by imprisonment for any term of years or for life . . . .

18 U.S.C. § 1201(a). Thus, in a prosecution under the statute, the government must show that a transportation was performed "unlawfully." Case law interprets this requirement as demanding a showing that the alleged victim was an "unconsenting person," as the court below acknowledged. *DeSilva*, 125 F.3d at 1114 (collecting cases).

This Court has held that, for purposes of the kidnapping statute, if a person cannot consent for him or herself, then the power to grant and withhold consent shifts to his or her legal proxy: "If the victim is of such an age or mental state as to be incapable of having a recognizable will, the [act alleged] then must be against the will of the parents or legal guardian of the victim" to constitute an offense. *Chatwin v. United States*, 326 U.S. 455, 460 (1946). However, the Circuits have split as to whether the inquiry that triggers the shift of the consent power under *Chatwin* – whether "the victim is of such an age or mental state as to be incapable of having a recognizable will" – may be resolved by relevant state family law.

A. Two Circuits Refuse To Follow State Family Law In a Federal Kidnapping Case.

As described above, the Seventh Circuit held here that state family law (specifically, a state court guardianship order embodying a prior, valid state court custody and mental incompetence determination) is of no weight in resolving *Chatwin*'s issue of whether the alleged victim in a kidnapping case is of such age or mental state as to be

incapable of having a recognizable will. *See DeSilva*, 125 F.3d at 1114. A federal court, it held, must decide this issue *de novo*, as a factual matter. *See id.* The Seventh Circuit so held in this case even though the state court guardianship order at issue had a perfect procedural pedigree. And, it so held even though the state court incompetency determination on which that order was based, which recognized the severity of Tammy's brain damage, has been consistently echoed and affirmed by every doctor and court that has considered whether Tammy is competent, both before and after the purported "kidnapping."

Like the Seventh Circuit, the Second Circuit has held that state family law (specifically, state statutory or common law presumptions that children of a given age are incompetent to give consent) is of no weight in resolving the issue of whether consent should shift to a proxy decisionmaker under *Chatwin*. *See United States v. Macklin*, 671 F.2d 60, 64 & n.5 (2d Cir. 1982). In *Macklin*, the defendant, Dennis Macklin, picked up a thirteen-year-old runaway named Bruce Rowe on the streets of Los Angeles and took him to New York City, where they slept in the open in Central Park. *Id.* at 62. Then, at a city swimming pool, in New York City, the defendant picked up an eleven-year-old girl named Selestine Valdez, who joined the defendant and Bruce in sleeping in Central Park for several nights. Finally,the defendant, leaving Bruce in New York, took Selestine with him to Philadelphia, where he was arrested. *Id.* at 62-63. Macklin was subsequently prosecuted for kidnapping Bruce and Selestine.

Bruce and Selestine's parents stated that "they never consented to their children's travelling with Macklin." *Id.* at 63. Nevertheless, the Second Circuit – holding that the

parents' failure to give consent was not enough – reversed Macklin's kidnapping conviction. It noted that:

> [T]he government contends that, although consent or acquiescence of the alleged victim is normally a complete defense to a kidnapping charge, when the victim is a minor it is the will and consent of the parent or parents which govern.

Id. But, it rejected the government's theory, holding that this theory, as reflected in the jury instructions the trial court had given, improperly substituted the will of the minors' parents for that of the minors themselves. *See id.* at 64.

In so holding, the Second Circuit failed to look to the statutory and common law of the States in which Bruce and Selestine resided (California and New York, respectively) relating to the age at which those States judge minors to have the capacity to consent on their own behalf. Nor did it heed *Chatwin*'s directive that the majority rule in the States is that the age at which a child may consent to travel is fourteen – three years older than Selestine was at the time. Instead, it simply ignored relevant State law and reversed the defendant's conviction – holding, incredibly, that Selestine, an eleven-year-old girl, could validly consent to travel interstate, without her parents' consent, with a man who was not related to her, whom she had never before met, and who had just suggested that they sleep outdoors in Central Park together. *See id.*

These two Circuit decisions are the predictable result of ignoring state family law – statutory, common law, and decisional – in a federal kidnapping prosecution. This is

what happens when unelected federal judges substitute their judgment in the place of the rich body of law that has developed over 200 years as a result of the work and thought of state and local legislatures, lawmakers, and judges. In contrast, as the following section shows, decisions in those Circuits that *do* follow state family law in federal kidnapping cases reach reasonable, justifiable outcomes, properly informed by the States' views on children's maturity and on the status of parents.

B. Two Circuits Follow State Family Law In A Federal Kidnapping Case.

The Eighth Circuit looks to state family law (specifically, common law with respect to the age at which children are competent to give consent) to resolve *Chatwin*'s issue of whether the alleged victim in a kidnapping case is of such age or mental state to be incapable of having a recognizable will. *See United States v. McCabe*, 812 F.2d 1060, 1061-62 (8th Cir. 1987) (citing *Chatwin*, 326 U.S. at 461 n.4 (collecting state common law cases)); *see also Miller v. United States*, 123 F.2d 715, 716 (8th Cir. 1941) (looking to Arkansas law to determine when a person is considered a "minor" for purposes of the federal kidnapping statute).

In *McCabe*, the defendant, Darrell Lee McCabe, took a twenty-three-month-old child named Bo Sandness away from his father, with whom the defendant had an ongoing dispute about who owned a certain Corvette. 812 F.2d at 1060-61. The defendant then traveled with Bo from the child's home in South Dakota to Minnesota, where the defendant was arrested for kidnapping. *Id.* McCabe argued that his conviction should be reversed because the government was required to prove, as a factual matter, not that Bo's father withheld his consent for Bo's travel, but that

Bo *himself* was incapable to consent to travel and did not consent. *Id.* at 1061. The Eighth Circuit noted the majority rule in the States (also cited in *Chatwin)* that incapacity is to be presumed for children under fourteen; assumed that South Dakota would apply this rule; and therefore reasonably concluded that because Bo was not even two years old, all that need be proven was that Bo's father had not consented to travel, not that Bo himself had withheld consent. *Id.* at 1061-62 (citing *Chatwin*, 326 U.S. at 461 n.4). Because Bo's father's lack of consent had been shown, the Eight Circuit affirmed McCabe's kidnapping conviction. Thus, unlike the Second Circuit in *Macklin*, the Eighth Circuit was able to protect a child too immature to consent and affirm a conviction of an exploitive adult – all because it properly looked to relevant state family law.

Like the Eighth Circuit, the Tenth Circuit also looks to state family law in federal kidnapping cases. Thus, it recently held in its *Floyd* decision that persons with the state common-law or statutory status of "surrogate parent" fit the parental exemption to § 1201. *United States v. Floyd*, 81 F.3d 1517, 1523-24 (10th Cir.), *cert. denied*, 117 S. Ct. 144 (1996).

In *Floyd,* the defendant, Franklin Delano Floyd, contended that he was exempt from prosecution for kidnapping because he was the surrogate parent for the alleged kidnapping victim, a child named Michael. Floyd had been married to Michael's mother, Sharon, before she died and for a time had acted as Michael's parent. *Id.* The Tenth Circuit held that a surrogate parent who had fully assumed parental rights and responsibilities would fit within the parental exemption to the kidnapping statute. *Id.* at 1522-24. However, it also held that Floyd himself – who had turned Michael over to the State of Oklahoma when

Sharon died and thereby abandoned his state-law surrogate parent status – was no longer a surrogate parent to Michael, and could therefore properly be convicted of kidnapping. *Id.* at 1525.

Thus, the Tenth Circuit in *McCabe* properly looked to the state family law status of surrogate parenthood (akin to the state family law status of common law marriage) in defining, for purposes of the federal kidnapping statute, both when a parental relationship is created and when it ends. And, by deferring to state family law, it properly afforded protection from kidnapping prosecution to true state-law surrogate parents, but withheld it from those who have abandoned their parental rights.

II. THE CIRCUITS ARE SPLIT AS TO WHETHER LEGAL GUARDIANS ARE EXEMPT FROM THE FEDERAL KIDNAPPING STATUTE

As noted above, the federal kidnapping statute (as amended) contains an express exception for transportation "of a minor by the parent thereof." 18 U.S.C. § 1201(a). However, even before this amendment, the immunity from kidnapping charges of those with custody over the alleged victim was always beyond cavil. Thus, parents were implicitly immune before they were expressly exempted from the statute's reach. *See United States v. Sheek*, 990 F.2d 150, 152 (4th Cir. 1993); *United States v. Boettcher*, 780 F.2d 435, 437 (4th Cir. 1985).[4] Congress introduced the parental exemption because it recognized this implicit immunity, and knew that no one wanted to see parents

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[4] The express parental exemption was necessary only to clarify that "divorce[d]," non-custodial parents were exempt, see 75 Cong. Rec. 13,296 (1932) (statement of Chairman Dyer).

prosecuted: "There is not anybody who would want to send a parent to the penitentiary for taking possession of his or her own child, even though the order of the court was violated and it was a technical kidnapping." 75 Cong. Rec. 13,296 (1932) (statement of Chairman Dyer).

Parenthood, for purposes of the kidnapping statute, is a relationship of custody under state law, not one of biology. It is beyond question that the term "parent," as used in the statute, would include an adoptive parent, who has been granted custody by a state family court. Conversely, the statute itself makes clear "the term 'parent' does *not* include a person [including a natural parent] whose parental rights with respect to the victim of an offense under this section have been terminated by a final court order" from a state court. 18 U.S.C. § 1201(h) (emphasis supplied).

The Circuits are split as to whether the parental exemption extends not just to parents, but also to legal guardians and others who, by state court order, stand *in loco parentis* to those over whom they have custody. (Put another way, they are split as to whether guardians are implicitly exempt from the statute just as parents used to be). Those Circuits that exempt legal guardians are in the right. To vary Chairman Dyer's plaintive statement, is there anyone who would want to send a legal guardian to the penitentiary for taking possession of his or her own ward? (Here, where the guardian is the husband, and the ward his wife, the question cannot help but take on a special plangency).

A. One Circuit Denies Legal Guardians An Exemption From the Federal Kidnapping Statute.

In the decision from which this petition is taken, the Seventh Circuit held that, despite the parental exemption, "[a] guardian who moves an [incompetent] adult ward across state or national boundaries, against [the ward's] will . . . may be convicted of kidnapping." *DeSilva*, 125 F.3d at 1115.

B. Two Circuits Accord Legal Guardians An Exemption From the Federal Kidnapping Statute.

The Tenth Circuit recently stated, in *Floyd*, 81 F.3d at 1523-24, that the parental exemption encompasses a "'person who holds the position or exercises the functions of a parent; a protector, guardian'" or is "acting *in loco parentis*" to his ward. *United States v. Floyd*, 81 F.3d at 1523-24 (quoting *Oxford English Dictionary*, vol. VII at 222 (2d ed. 1989)); *see also Black's Law Dictionary* (5th ed. 1979) (defining "parent" to include person whose "guardian" status "has been established by judicial decree"). In reaching the conclusion that a surrogate parent fits within the parental exception to the statute, the court reasoned that what matters, for parental status, is not biology but whether a quasi-parental relationship exists between the alleged kidnapper and the alleged victim, and whether the alleged kidnapper fulfills the legal "duties" and "responsibilities" of a parent. *Id.*

The Eighth Circuit holds similarly that the parental exception applies to those who "stand[] in a position equivalent to that of a parent." *Miller*, 123 F.2d at 717. In

Miller, it emphasized that a stepparent could count as a parent for purposes of the parental exemption, as long as the stepparent took on parental "duties and liabilities" imposed by state family law. *Id.* It reasoned that while "parent," in a narrow sense, denotes "consanguinity," "the term 'parent' in a broad sense" may also extend to certain quasi-parental legal relationships. *Id.* However, it held that the particular defendant at issue – who had not legally adopted the child victim – had not taken on these duties and thus was still effectively a "stranger" to the victim. *Id.*

In an era of adoption, stepparents, surrogacy, and guardianship, these Circuits sensibly did not rely on their own views on these intimate issues, but rather looked to state family law, to define who has a legal status equivalent to that of a "parent."

III. THE DECISION CONFLICTS WITH A DECISION OF THIS COURT

The decision below conflicts with this Court's decision in *Chatwin*, on both of the issues on which the Circuits have split. *Chatwin* demonstrates that a federal court in a kidnapping case must follow state family law. And, *Chatwin* expressly treats parents and legal guardians of incompetent adult wards as equivalent for purposes of the federal kidnapping statute – thereby entailing the conclusion that legal guardians are, like parents, exempt from the statute's reach. The conflict between the decision below and this Court's decision in *Chatwin* is so sharp, and the injustice to petitioners so pronounced, that not just certiorari, but also summary reversal, is warranted here.

A. *Chatwin* Requires A Federal Court To Follow State Family Law In A Kidnapping Case

Chatwin itself looked to state family law to answer the question that triggers the shift of the consent power to a proxy decisionmaker in a kidnapping case: whether the alleged victim was of such age or mental state to be incapable of having a recognizable will. 326 U.S. at 461. There, the Court addressed the question whether a fifteen-year-old girl could consent to being transported across state lines over her parents' objection. *Id.* It began by looking to the law of the girl's home state, Utah, concerning the legal capacities of fifteen-year-olds, finding in Utah law no suggestion that fifteen-year-olds were not competent to give and withhold consent. *Id. Only then* – after it found no state law basis for presuming a fifteen-year-old's consent ineffective as a matter of law – did the Court go on to require a federal court to make a *de novo* factual determination as to whether the girl herself had the ability to give and withhold consent. *Id.*

In holding that a factual determination of competency was required for a fifteen-year-old, the Court rejected the government's argument that evidence that the girl possessed a "mental age" of seven meant that state statutory and common law presumptions concerning the incapacity of actual seven-year-olds were applicable. *See id.* at 462 & n.5 (collecting cases refusing to apply state statutory presumptions of incapacity for young children to adults for whom there was evidence of low mental age). Importantly, however, the Court did *not* reject these State incompetency presumptions themselves. On the contrary, the Court embraced them – indicating that had the girl's actual, chronological age been not fifteen but seven, it would have

followed Utah's lead; presumed her incapable of giving and withholding consent; shifted the power of consent to proxy decisionmakers (the girl's parents); and then looked to the evidence as to whether her parents had consented on her behalf. *See id.* at 461. Accordingly, the Court cited with approval a series of decisions embracing common law presumptions of incapacity for children below the age of fourteen.

The Court's careful exegesis of Utah statutory and common law in *Chatwin*, would have been entirely pointless had state family law been irrelevant in a federal kidnapping case, as the decision below held. Under *Chatwin*, a federal court in a kidnapping case must first look to state family law and, *only if no state law applies*, must assess the alleged victim's consent power as a *de novo* issue of fact. Thus, the Seventh Circuit got *Chatwin* precisely wrong when it said that *Chatwin* "holds that consent can be given [by the alleged victim]. . . even when state law deems the person transported to be incapable of making an independent choice." *DeSilva*, 125 F.3d at 1114. On the contrary: *Chatwin* holds that if state law deems the person transported to be incapable of making an independent choice, then state law is dispositive and consent *cannot* be given by the alleged victim.

Although *Chatwin* involved state statutory and common law presumptions of incompetency, its analysis applies with even greater force to state court guardianship orders such as the one at issue here, for several reasons. First, the Court's acceptance of state law presumptions of class-wide incapacity for a particular group of persons (those below a certain chronological age) entails its acceptance of state court individualized adjudications of incompetency, on an evidentiary record, for particular persons, as well.

Second, *Chatwin*'s analysis is particularly apt where, as here, not just an incompetency finding, but a state guardianship order premised on such a finding is at issue. Such an order represents not just a one-shot *competency* determination concerning mental capacity, but also a continuing *custody* order, which, *as a matter of state law*, shifts the ward's power to consent in all life decisions regarding the ward's person and financial matters to the guardian, until and unless the order is modified. (For example, even if the ward appears to have regained competence, she still cannot validly sign a contract on her own behalf unless and until she is *adjudicated* competent and the guardianship is terminated by the court). A parent or other guardian has legal custody precisely so that he or she can override his or her ward when the ward voices preferences that she may strongly and sincerely feel at the time, but that are not in her long-term best interests, and retains such custody until a court holds that the power to consent should revert to the ward.

Third, a guardianship order shows that the state court trusts the particular guardian it has selected with the most intimate and momentous decisions in the life of the ward, and has found that it is in the ward's best interests to have her decisions made by this particular guardian – making it all the more anomalous for that guardian later to be branded a "kidnapper."

Finally, as this Court has stated, state court judgments have full *res judicata* effect in federal court: "[i]t is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren School Dist. Bd. of Educ.*,

465 U.S. 75, 81 (1984) (applying Full Faith and Credit Act, 28 U.S.C. § 1738).

Thus, *Chatwin* requires that a federal court in a kidnapping case (as here) look to state family law, whether statutory, common law, or decisional. The Seventh Circuit opinion below therefore directly conflicts with *Chatwin* when it ignores state family law.

B. *Chatwin* Expressly Recognizes That Parents And Legal Guardians Are Equivalent For Purposes of the Federal Kidnapping Statute, Which Entails That Both Are Exempt From the Statute

In *Chatwin*, this Court expressly recognized the equivalence of "parents" and "legal guardians" of incompetents under the federal kidnapping statute when it discussed proxy decisionmaking. Thus, it stated that, for the purposes of § 1201, "[i]f the victim is of such an age or mental state as to be incapable of having a recognizable will, the confinement [or transportation] then must be against the will of the *parents or legal guardian* of the victim." 326 U.S. at 460 (emphasis added). Moreover, the *Chatwin* Court recognized this equivalence in 1946, after § 1201 had been amended in 1934 to include the parental exemption. *See Gooch v. United States*, 297 U.S. 124, 128 (1936) (discussing amendment).

In equating parents and legal guardians, the Court recognized the parallel structure of the parent/child and guardian/ward relationships. As the Restatement notes, regardless of whether a custody order is parent/child or guardian/ward, it "create[s] the same sort of relationship between the child, or incompetent, and the person to whose

care he is awarded," and is therefore treated the same under the law. *Restatement (Second) of Conflicts of Laws* § 79 cmt. d, at 239 (1971).

Given the Court's holding that parents and legal guardians of incompetents have equal status as trusted proxy decisionmakers, it would be wholly perverse, and contrary to the Court's plain language, if – as the Seventh Circuit held here – the statute did not equally exempt both parents and legal guardians. *This would mean, absurdly, that the very same legal guardian whom a third party would be legally required to consult in order to get proxy consent for the ward's travel could himself commit a federal felony, punishable with life imprisonment, if he traveled with the ward over the ward's protest.*

It is also extremely hard to believe that the *Chatwin* Court – which repeatedly referred to the state statutory and common law backdrop, *see supra* § IIIA – would have countenanced this absurd result, given that state statutes and decisions addressing the question (as well as the Model Penal Code, § 212.1(1962)) *uniformly and without a single exception* exempt guardians from kidnapping and false imprisonment charges.[5] Indeed, to our knowledge, there is not a single case

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[5] See Taylor v. Gilmartin, 686 F.2d 1346, 1352 (10th Cir. 1982) (action cannot be brought against guardian for falsely imprisoning ward); Illinois v. Marin, 269 N.E.2d 303, 306 (Ill. 1971) ("the offense [of kidnapping must] be against the will of the victim or against the will of the victim's parent, guardian or legal custodian"); Hemphill v. Mississippi, 90 So. 488, 489 (Miss. 1921) ("It is inconceivable that a guardian who is entitled to the custody of the person of his [incompetent] ward could be guilty of kidnapping such ward."); Barker v. Washburn, 93 N.E. 958, 960 (N.Y. 1911) (guardian free to move incompetent ward over whom he has custody); Robinson v. Frost, 54 Vt. 105, 111 (1881) (wife may alter domicile of incompetent spouse); Townsend v. Kendall, 4 Gil. 315, 325 (4 Minn. 412) (1860)) (guardian can never be guilty of falsely imprisoning

in the history of the Republic in which a State has ever allowed a legal guardian to be prosecuted for kidnapping. (Nor has the federal government ever allowed this, except here). This is the "page of history," worth a volume of logic, to which Chief Justice Rehnquist referred when he argued for deference to the States in the area of family law. *See Santosky*, 455 U.S. at 770 (quotation omitted) (Rehnquist, J., dissenting) As the *Chatwin* Court knew, this history formed the background against which Congress legislated when it enacted § 1201, and Congress expressed no intent to abrogate the common law on this issue.

For these reasons, the decision below sharply and directly conflicts with *Chatwin* when it holds that parents and legal guardians are not equivalently exempt from § 1201. Further, this conflict is so pronounced that summary reversal is warranted. The Seventh Circuit's decision squarely defied *Chatwin*'s command that parents and guardians be treated alike – as well as an uninterrupted history, dating from the dawn of the Republic, of protection of persons whom the States have endowed with legal guardian status from kidnapping prosecutions. *See supra* n.5. This decision thus inflicted on petitioners a grave injustice that prior law – as well as common understandings of the powers of a plenary guardian such as Anthony – uniformly suggested could never occur.

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ward); N.J. Stat. Ann. § 2C:13-1(d); 18 Pa. Cons. Stat. § 2901(b); Tenn. Code Ann. § 39-13-301(2).

IV. THE ISSUES ARE FUNDAMENTAL AND RECURRENT

This case raises a federalism issue that is of significant national importance. It also raises family law issues concerning the powers of state-law guardians that are of great personal importance to many individuals.

First, it is a basic principle of federalism that family law is the province of the States. Thus, this Court recently held that the commerce power does not reach "family law (including marriage, divorce, and child custody)." *United States v. Lopez*, 514 U.S. 549, 564 (1995); *see also id.* at 624 (Breyer, J., dissenting) (same). And, this Court similarly made clear long ago that "[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-94 (1890).[6] If the States do not have final say in the family law area – the most quintessentially local area there is – then there is very little left to them under our system.

Second, it is important to note that this case matters greatly to guardians *and* their wards. The Seventh Circuit's decision below might appear to be pro-ward, but it is really just the opposite. In refusing to defer to relevant state family law, it will hamstring prosecutions in cases where vulnerable victims such as young children and incompetent adults have

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[6] *See also Thompson v. Thompson*, 484 U.S. 174, 186 n.4 (1988) (same); *McCarty v. McCarty*, 453 U.S. 210, 220 (1981) (same); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (same); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (same); *see also Ankenbrandt v. Richards*, 504 U.S. 689 (1992) (sustaining domestic relations exception to federal diversity jurisdiction).

been kidnapped by ill-intentioned, dangerous third parties. This point is illustrated by the Second Circuit's parallel holding in *Macklin*, which refused even to protect an eleven-year-old girl by presuming her incompetent to consent to travel to another state with a man who was a stranger to her.

In cases where vulnerable victims such as incompetents and young children are involved, the very deference to state family law on the consent issue that the Seventh Circuit rejected is absolutely crucial. Such deference allows the parent or guardian to act as proxy decisionmaker *as a matter of law*, stripping dangerous third-party kidnappers of the defense that the child or incompetent, *as a matter of fact*, consented to be transported. No matter what, before a third party transports a young child or an adjudicated incompetent over state or national boundaries, that third party should be legally required to approach the relevant legal protector – whether custodial parent or guardian – beforehand to get consent, or else face a kidnapping prosecution. The government should not have to prove beyond a reasonable doubt, as a factual matter– as the Seventh and Second Circuits have held it must – that the young child or incompetent was incapable of giving consent in order to shift the power to consent to travel to a proxy decisionmaker, the parent or guardian. Instead, the parent or guardian should have that power *as a matter of state law* – just as he or she does in every other important decision in the child's or ward's life.

Finally, this case is also significant to guardians and wards for another reason: The decision below will predictably hamper wards from receiving the best possible medical care, and prevent guardians from acting in their wards' best interest when to do so requires interstate or international travel. It is a fact of life: Children and

incompetent adults will protest some of the very things that are best for them – sometimes even those that are crucial for their survival. They will fight tonsillectomies or inoculations, and shrink from necessary surgery; they will want to dissipate a trust or invest recklessly; they will not fully understand the consequences of their actions. That is precisely why parents and guardians are state-law proxy decisionmakers for their children and wards. Yet in the area of travel, the decision below transforms what is generally a fiduciary duty – to overrule the ward in his or her own best interest – into a federal offense. The decision below thereby affects (and chills) the guardian who wants to bring a ward with Alzheimer's disease to live with her in another state – knowing that the ward will weep and scream when asked to leave the familiar setting. It equally affects (and chills) the guardian who wants to bring a ward with paranoia or schizophrenia to a state where there is a better psychiatric institution, knowing that the ward will have delusions about what is happening when he is moved.

Fear of prosecution on the part of these beneficent guardians would hardly be speculative. Here, the statute was held to allow felony prosecution, with a possible penalty of life imprisonment, of a guardian and husband who wanted to transport his severely brain-damaged ward and wife temporarily so that she could undergo a medical examination crucial to the lawsuit that he had brought on the wife's behalf – which was the only way she could recover damages for the accident that had disabled her.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

Gerald A. Feffer
Max Stier*
Matthew J. Herrington
Julie C. Hilden

WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Michael J. Howlett, Jr..
James D. Wilson
Patricia S. Spratt

SHEFSKY & FROELICH, LTD.
444 North Michigan Ave.
Chicago, IL 60611
(312) 527-4000

*Counsel of Record

Counsel for Petitioners